

Fine Art Online: Digital Imagery and Current International Interpretations of Ethical Considerations in Copyright Law

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The advent of the Internet has radically transformed the way in which images of fine art can be viewed by much of the world. One of Amedeo Modigliani's rarely seen portraits of Jeanne Hébuterne, an oil-on-canvas painting done in 1919, can be seen on the website Artnet.com.¹ It can also be seen in a photograph of a Christie's porter handling the original painting on the Getty Images' website.² And, since the painting did not sell for the auction's reserve, or minimum, sale price, the painting is presumably back with the owners who put it up for auction, and can be seen in person at their home.

The image of Edgar Degas' *Dancers in Blue*, a pastel work done in the late 1890s, can be seen on the Corbis website,³ as well as on a poster sales website⁴ that is advertising the image. Or, to view this work in person, one could visit the Pushkin Museum in Moscow.⁵ New technology is constantly challenging human perceptions of how and whether a new mechanism for a traditional activity is permissible in society. The manner in which the law translates new technology can be awkward and contentious. This writing will examine how and whether various types of images can be viewed and

¹ Artnet.com reports on the selling prices of certain pieces of art that have been put up for auction. See http://www.artnet.com/Auction/AuctionsOnLineDetail_Preview.asp?LotID=2911902&Page=1&T=9&AUD=26938 (last visited Feb. 24, 2004).

² See www.gettyimages.com. To find this particular image, type in "Christie's" in the search engine. Getty Images' inventory of images is not permanent. This image was last viewed Feb. 24, 2004.

³ See www.corbis.com. To find this particular image, type in "Degas" in the search engine. Like Getty Images' inventory of images, Corbis' inventory is not permanent. This particular image was last viewed Feb. 24, 2004.

⁴ See Picassomio Art Posters, *Danseuses en Bleue*, available at <http://www.picassomio.com/posters/c1013,c10996,c12558/en/> (last visited Feb. 24, 2004).

used in non-traditional formats, and address some of the issues for which domestic and international laws have needed to adjust their traditional tenets.

This topic is extremely broad and complex. A large portion of the intersecting interests between the Internet, fine art and technology regards the doctrine of fair use in copyright law, which provides a legal defense to the usage of copyrighted works for purposes of education, for example. Whether a copyrighted online image could be used for a professor's PowerPoint presentation would fall into this realm of inquiry. This writing will focus on the rights and responsibilities the groups of people involved in online imagery; those who are depicted, those who create the image, those who own the copyright, those who own the original artwork itself, and those who view it.

To provide a framework in which to understand these issues, I will provide an outline in Part I of selected international copyright regimes. In Part II, I will briefly touch on the importance of choice of law analyses, and will look at rights of privacy and rights of publicity in their historic context and will discuss new challenges that confront current laws in these domains in the context of the Internet. In Part III, I will analyze moral rights as they are understood by various nations, and how they are being interpreted in tandem with the Internet. In Part IV, I will discuss the opportunities and difficulties faced by advances in digital rights management. In Part V, I will synthesize the prior analyses by means of the example of a single artist and, in Part VI, the conclusion, I will suggest that, while harmonization of international copyright law seems, *a priori*, the most beneficial plan for the future, there may be alternative systems that are more realistic and more beneficial. The ideal system could provide clear rules to copyright holders as to

⁵ See The Pushkin Museum, Art of the Eighteenth and Nineteenth Centuries, available at <http://www.museum.ru/gmii/defengl.htm> (last visited Feb. 24, 2004).

their bundle of rights in a given jurisdiction and how to enforce them, and preserve the deep-seated ideological underpinnings of copyright law in individual countries. If harmonization does occur at some point, I would recommend that artist's rights be an important part of the discussion.

I. International Copyright Regimes

Prior to the first international bilateral copyright treaty's implementation in the middle of the nineteenth century, France called for a universal law of copyright.⁶ It was the case then, and still is today, that “[a]ll nations’ domestic laws reflect internal values, mores, and social conditions. Copyright laws are no exception.”⁷ Although international copyright protection legislation still does not exist today, signatories to the Convention for the protection of Literary and Artistic Works, signed in 1886 in Berne, Switzerland, have increased steadily since the Convention’s inception. The ten original signatory countries⁸ to the Convention comprised the Berne Union;⁹ an entity that exists apart from the treaty so that no Union member need adhere to any revisions of the Convention in order to remain Berne Union members. There are currently 154 state members of the Berne Union.¹⁰

Essentially, the jurisdictional component of the Berne Convention, most recently revised in 1971, is based on a principle of national treatment, wherein a copyrighted work

⁶ Paul Goldstein, *INTERNATIONAL INTELLECTUAL PROPERTY LAW*, 143 (Foundation Press, 2001).

⁷ Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 *IDEA* 607, 611 (2003).

⁸ The original ten countries were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the United Kingdom. *See id.*

⁹ The Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>. [hereinafter the Berne Convention] Art. 1 reads: “The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.” *Id.*

¹⁰ *See* The Berne Convention, Contracting Parties, available at <http://www.wipo.int/treaties/en/documents/word/e-berne.doc> (last visited Apr. 3, 2004).

from any Berne Union country will be treated in any other country according to the latter's copyright law. For example, a French artwork that is infringed in Germany will be protected in Germany at least to the extent that a German work would be protected there.¹¹ A tenet of the Berne Convention that has made it attractive to so many countries is its relative leniency insofar as it allows member States to maintain much autonomy in implementing the Convention and accommodates diversity in national laws.¹² Another key element of the Berne Convention, at least insofar as the United States' recent implementation of it is concerned, is its requirement of moral rights protection. Article 6bis of the Convention necessitates that the rights of paternity and integrity be guaranteed to copyright holders. Broadly, this means that an artist, author, or other creator of a work, "shall have the right to claim authorship of the work."¹³ The right of integrity provides that the author or artist has the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."¹⁴

There are two primary perspectives about the "purpose of intellectual property protection...[they are] economic and moral."¹⁵ As shall be discussed below, the United States has fallen much more on the side of economic than moral interests, despite its eventual implementation of the Berne Convention in 1988,¹⁶ while France, a bastion of author's rights advocacy, falls on the moral side. In even broader terms of socio-cultural

¹¹ The Berne Convention, *supra* note 9. Art. 5 of the Convention reads: "Authors shall enjoy...in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." *Id.*

¹² Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST L.J. 733, 741-42 (2000).

¹³ The Berne Convention, *supra* note 9, at Art. 6bis.

¹⁴ *Id.*

¹⁵ Jackson, *supra* note 7.

generalization, Western ideals are centered around the free market, individual rights and the idea that profits are the appropriate reward for creative endeavors, while other systems are more interested in the welfare of the community and equal distribution of wealth.¹⁷ Wide discrepancies in points of view about this aspect of copyright law explain the movement to harmonize copyright law on an international scale. Harmonization through reduction of national legal disparities would ostensibly reduce the cost, time and uncertainty involved in determining rights, thereby reducing obstacles to innovation and global trade.¹⁸

Short of harmonization, these discrepancies demonstrate an acute need to implement a clear structure whereby States with different views about moral rights can trust that their interests in protecting the intellectual property rights of their nationals are being satisfied. Indeed, harmonization may be both impractical and undesirable. An emphasis on harmonization may actually prevent individual countries from pursuing their own domestic policy agendas.¹⁹ Furthermore, copyright law “goes to the heart of a nation’s information and cultural policy because [it] influences the creation and distribution of knowledge and culture.... [I]t is no surprise that nations would resist giving up autonomy over their copyright policies.”²⁰

II. Choice of Law

¹⁶ See the Berne Convention Implementation Act, available at <http://www.cni.org/docs/infopols/US.Berne.Convention.html> (last visited Apr. 4, 2004).

¹⁷ Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say ‘Property’? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT’L. & COMP. L. 307, 321 (1996).

¹⁸ Graeme B. Dinwoodie, *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM. VLA J.L. & ARTS 307, 312 (2000).

¹⁹ Fred H. Cate, *Introduction: Sovereignty and the Globalization of Intellectual Property*, 6 IND. J. GLOBAL LEG. STUD. 1, 1-2 (1998).

²⁰ See Jackson, *supra* note 7, at 643.

In the United States, “[c]hoice of law issues have largely been ignored in past copyright decisions, with many courts apparently assuming without analysis that U.S. law applies to determine ownership and infringement for foreign nationals.”²¹ Insofar as choice of law is an issue, Berne Union States must agree that the national law of infringement will be applied uniformly to foreign and domestic authors and artists, as described above. Both procedural and substantive differences in copyright laws may make choice of laws questions determinative of the outcome in a given case. For example, as a default rule, copyright for Berne Union members lasts for 50 years after the death of the author or artist,²² but individual countries have an option to provide longer protection. In European Community countries, artists rights societies and pay-per-view lobbies have succeeded in raising this duration to 70 years after the artist’s death.²³ The determination of the length of a work’s copyright protection is a different number of years in different countries, illustrating how choice of law is of paramount importance.

Choice of law in copyright disputes is, at best, “a work in progress.”²⁴ Any given copyright case will involve a number of factors that determine whose law should be applied, including meanings of originality and ownership, and conceptual questions such as the scope of applicable subject matter. While an in-depth discussion of choice of law issues is beyond the scope of this writing, it is essential to note that it is an extremely important but unclear area of law whose boundaries and parameters have not yet been

²¹ Mark V.B. Partridge, *Choice of Law in International Copyright Disputes*, Pattishall, McAullife, Newbury, Hilliard & Geraldson, 1998.

²² Berne Convention, *supra* note 9, Art. 7.

²³ See Council Directive 93/98/EEC, Oct. 29, 1993, *Harmonizing the term of protection of copyright and related rights*, available at http://europa.eu.int/eur-lex/en/consleg/pdf/1993/en_1993L0098_do_001.pdf. (last visited Apr. 4, 2004).

²⁴ William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 469 (2000).

defined by the courts.²⁵ The advent and growing use of the world wide web as a platform on which to view, copy and disseminate works of intellectual property exacerbate the issue and has caused much discussion and legislation,²⁶ but the interpretation of these new treaties remains inconsistent. The Internet, in this context, is an unprecedented challenge; its “global dimensions, which cut across territorial borders, are creating significant legal questions...[it] is a legal and jurisdictional ‘no-man’s land.’”²⁷

Two treaties promulgated by the World Intellectual Property Organization [hereinafter WIPO] clarify that existing rights continue to apply in the digital environment. They also create new online rights. “To maintain a fair balance of interests between the owners of rights and the general public, the treaties further clarify that countries have reasonable flexibility in establishing exceptions or limitations to rights in the digital environment.”²⁸ Like the Berne Convention, then, these two “Internet treaties”²⁹ do not mandate harmonization. The application of the laws of one country’s system over another will, in most cases, lead to different results.³⁰ One solution may be to select, based on certain criteria, from among the various potentially applicable systems, the laws of one system to govern the legal relationship. “This, in essence, is the

²⁵ For an excellent discussion of current choice of law issues in copyright, *see* Patry, *id.*

²⁶ Two treaties were concluded in 1996 at the World Intellectual Property Organization (WIPO) in Geneva. One, the WIPO Copyright Treaty (WCT), deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs. The other, the WIPO Performances and Phonograms Treaty (WPPT), protects certain “related rights” (that is, rights related to copyright): in the WPPT, these are rights of performers and producers of phonograms. There are currently 46 States party to the WCT and 43 States party to the WPPT. The United States is party to both; France is party to neither. *See generally* <http://www.wipo.int/treaties/en/ip/index.html> (last visited Apr. 5, 2004).

²⁷ Raquel Xalabarder, *Copyright: Choice of Law and Jurisdiction in the Digital Age*, 8 ANN. SURV. INT’L & COMP. L. 79 (2002).

²⁸ WIPO, Copyright, Frequently Asked Questions, available at http://www.wipo.int/copyright/en/faq/faqs.htm#P21_3830 (last visited Apr. 5, 2004).

²⁹ *Id.*

³⁰ Intellectual Property on the Internet: A Survey of Issues, 81, para. 277. World Intellectual Property Organization, 2002.

exercise of determining the applicable law under a private international law approach.”³¹

Whether and how the Internet treaties will function in an international context insofar as choice of law has yet to be seen, because they bow to individual nations’ implementing legislation. “This means that even if the international norm-makers got the balance right..., there remains ample opportunity for national legislators to get it ‘wrong’...”³²

In response to the existing nebulous choice of law schemes, and to attempt to deal with jurisdictional matters of international intellectual property matters, Professors Rochelle Dreyfuss and Jane Ginsburg have been working on a draft convention adapted from the text of the Draft Hague Convention. In January 2001, the professors presented WIPO delegates with a Draft Convention On Jurisdiction And Recognition Of Judgments In Intellectual Property Matters [hereinafter Draft Convention], providing suggestions for dealing with the regulation of online content.³³ The Draft Convention was intended to cover a gamut of intellectual property matters such as copyrights, neighboring rights, trademarks, and unfair competition, and was meant to cover disputes regarding violations occurring not only on the Internet but also in the off-line world.³⁴

A report was drafted in March of 2004 to summarize the progress of the Draft Convention. The objective of the Convention, upon its completion, is “to make exclusive choice of court agreements as effective as possible in the context of international

³¹ *Id.*

³² Jane C. Ginsburg, *Book Review: Balance in International Copyright Law: The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis*. By Jorg Reinbothe and Silke von Lewinski, 2002. 26 COLUM. J.L. & ARTS 201, 216 (2003).

³³ See Rochelle C. Dreyfus & Jane C. Ginsburg, *Draft Convention On Jurisdiction and Recognition of Judgments In Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065 (2002).

³⁴ *Id.*, at 1074.

business.”³⁵ The present form of the Draft Convention is a bit different from the original that Professors Dreyfuss and Ginsburg drew up in the late 90’s, however. This is because, as work proceeded on drafting, it became apparent that it would not be possible to draw up a satisfactory text for a convention that deals with so many different jurisdictional models within a reasonable period of time. “The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention.”³⁶ Sections 29 and 30 of the revised Draft Convention deal specifically but cursorily with intellectual property and the Draft has yet to be passed.

A. Choice of Law Difficulties: Rights of Privacy and Rights of Publicity

Having briefly examined the landscape of international copyright law, I will discuss an issue that demonstrates the variances in national copyright tenets which, arguably, would be difficult if not insurmountable differences in drafting a potential international law. The very philosophical foundations of some intellectual property laws are so different as to be diametrically opposed in some instances. For example, if someone takes a clear photograph of a couple strolling in a park and posts it to her weblog as one of several places she visited in town during vacation, the ramifications may be far different in the United States than in a European country. United States law generally fails to be roused unless the photographer is making a profit on the image, so the weblogger is likely safe in posting that photograph.

³⁵ Masato Dogauchi and Trevor C. Hartley, Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report, March 2004, at 6, available at http://www.hcch.net/doc/jdgm_pd25e.pdf (last visited April 17, 2004).

³⁶ *Id.*

A European law, however, may be interpreted so as to be just as interested in protecting the privacy of the subject of the photograph as in protecting the monetary interest the subject has in his or her image. Under a European law, therefore, the weblogger may be violating personality rights of the couple simply by dint of the fact that their faces are recognizable. In a 1988 case heard by the Dutch Supreme Court, the magazine publication of a photograph of a couple walking in Amsterdam's Vondelpark was found to infringe on the couple's right of privacy; unbeknownst to the photographer, the couple were having an affair and sued the magazine for having publicized that fact.³⁷

i. The United States

In the United States, privacy law governs a host of issues ranging from public disclosure of private facts to intrusion upon seclusion to "false light," which is a tort that creates a cause of action when one publicly discloses a matter that places a person in a false light that is "highly offensive to a reasonable person."³⁸ The right of publicity falls into a subgroup of privacy issues called appropriation. "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."³⁹ The right of publicity was first recognized in a 1953 Second Circuit case, wherein the judge held that "many prominent persons (especially actors and ball players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways."⁴⁰

³⁷ H.R. 1 juli 1988, NJ 1988, 1000.

³⁸ Restmt (2d) of Torts § 652c (1977).

³⁹ *Id.*

⁴⁰ *Halelan Laboratories v Topps Chewing Gum Inc.*, 202 F. 2d 866, 868 (2d Cir. 1953).

Economic interests seem to drive the U.S. law that protects the appropriation of one's likeness, at least when that person's likeness could potentially engender a profit for the appropriating party. Other aspects of privacy law are aimed at protecting a person's sense of self, but these laws are often not codified and the outcomes of case law are inconsistent.⁴¹ In his seminal work on the rights of publicity and privacy, J. Thomas McCarthy stated succinctly that "while the appropriation branch of the right of privacy is invaded by an injury to the psyche, the right of publicity is infringed by an injury to the pocketbook."⁴²

ii. European Civil Law Traditions

In contrast with common law jurisdictions, most civil law jurisdictions have specific codified provisions that protect an individual's image, personal data and other generally private information. Exceptions have often been carved out of these general, broad privacy rights when dealing with news and public figures. Moreover, personality rights, somewhat akin to United States' general privacy rights, are generally inheritable in European civil law jurisdictions.

In France, personality rights are protected under Article 9 of the French Civil Code. In essence, the article provides that all persons have a right to a private life and that a judge has discretion to ensure that privilege.⁴³ While publicly known facts and images of public figures are not generally protected, use of someone's image or personal history has been held actionable under French law. In 2000, for example, it was held that placing a person's photograph on the Internet without that person's acquiescence is a

⁴¹ Daniel J. Solove and Marc Rotenberg, *INFORMATION PRIVACY LAW*, 162 (Aspen Publishers, 2003).

⁴² J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* §5:61, at pp. 5-110 (2000).

⁴³ Code Civil de la France, Art. 9. "Chacun a droit au respect de sa vie privée. Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres,

violation of that person's personality rights.⁴⁴ In Germany, Article 2, Section 1 of the German Basic Law provides that "every person shall have the right to free development of his personality insofar as he does not violate the rights of others...."⁴⁵ The German personality right is closely associated with human dignity and an idea that borders on a right to respect.⁴⁶

As suggested above with the example of the couple walking in the Vondelpark, not only do these different models of law rest in different philosophical foundations, they also have the inherent capacity of producing opposite outcomes. This dichotomy is further exemplified in an analysis of moral rights doctrine.

III. Moral Rights

The above discussion of personality rights and rights of publicity are a tangent as well as an introduction to the broader doctrine of moral rights. Moral rights encompass various strains of the protection discussed above, namely, personal interest in the creation of one's authorship. For example: a photograph may include both the personality interest of the subject of the photograph and the moral rights interests of the photographer himself. For a painting, the equation is usually simplified to the interests of the painter, although there have been cases that brought into question the rights of the painter's subject and commissioner.⁴⁷ The principal rationalization for the protection of moral

propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée : ces mesures peuvent, s'il y a urgence, être ordonnées en référé." *Id.*

⁴⁴ *S.A Multimania Production v. Madame Lynda L., France Cybermedia, SPPI, Esterel.* Cour d'Appel de Versailles, June 8 2000.

⁴⁵ Grundgesetz (Basic Law) art. 2, para. 1.

⁴⁶ Gabrielle S. Friedman and James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 257 (2003).

⁴⁷ In 1893, the painter James McNeill Whistler was commissioned to paint a lady's portrait. Whistler completed the portrait with the approval of the commissioner and exhibited it at a Parisian Salon. The commissioner paid what Whistler thought an inadequate amount, after which Whistler painted out the lady's head. The commissioner sued for the restoration of the painting, inter alia, but the Court of Appeals and the Cour de Cassation agreed that Whistler could not be compelled to restore the portrait. See John

rights is the idea that the work of art “is an extension of the artist’s personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality.”⁴⁸

In modern history, this idea of protecting the extension of oneself can be traced back to the German philosopher Immanuel Kant, among others. Kant believed that an author’s vision can be encompassed by an action, which is an exertion of the author’s will, not an external, other thing.⁴⁹ Indeed, an author can “find Ideas for a given concept, and moreover...*express* those Ideas in such a way that the subjective state of mind accompanying the concept can be communicated to others.”⁵⁰

In an 1841 note addressed to the Members of a Parliamentary Committee responsible for examining the revision of the law on literary property, French author Honoré de Balzac asked the question: ‘who on earth can prevent the recognition of the only property that human beings create without earth or stone, and which is as durable as earth and stone?’⁵¹ Balzac and fellow writer Victor Hugo founded la Société des gens de lettres (The Society of French Writers) in 1837, which was expanded and replaced in 1851 by the Société des Auteurs, Compositeurs et Editeurs de Musique [hereinafter SACEM].⁵² This was the first collective administration or copyright collecting society for creators and publishers. SACEM’s function and importance will be discussed more

Henry Merryman and Albert E. Elsen, *LAW, ETHICS AND THE VISUAL ARTS*, 308. (4th ed., Kluwer Law International, 2002).

⁴⁸ Merryman and Elsen, *id.*, at 309.

⁴⁹ Nathalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1203, 1209 (2002).

⁵⁰ C. Aide, *A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right*, *U. TORONTO L.J.* 211, 215 (1990).

⁵¹ Florence-Marie Piriou, *The Author’s Right to Intellectual Property*, *DIOGENES*, No. 196, Vol. 49; Pg. 93 (Dec. 2002).

⁵² Caslon Analytics Profile: Copyright Collecting Societies, available at <http://www.caslon.com.au/colsocietiesprofile.htm> (last visited Apr. 25, 2004).

below, but it is interesting to note here that struggles in copyright law insofar as compensation to authors, artists and their distributors do not constitute a new friction; they are inherent in the law's lack of specific remuneration plan. European countries have dealt differently with the concept of moral rights, but the differences amongst them are small compared to the dissimilar moral rights underpinnings of United States law, which has only very recently recognized their existence. The divergent philosophical bases for these models can arguably be gleaned from their respective *definitions* of moral rights.

A. The United States

Moral rights are defined in the United States as rights “protecting a visual artist’s work beyond the ordinary protections of copyright.”⁵³ The United States’ Visual Artists Rights Act of 1990, discussed below, defines moral rights as including “both integrity rights, which protect the work from changes that damage the artist’s or the work’s reputation, and attribution rights, which allow the artist to claim authorship of the work and to prevent the unlawful use of the author’s name in reference to a modified version of the work.”⁵⁴ The Berne Convention’s definition of moral rights includes more breadth and specificity:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed...⁵⁵

⁵³ BLACK’S LAW DICTIONARY, 1025. (Seventh edition, 1999).

⁵⁴ Visual Artists Rights Act of 1990, 17 USCA §§ 106A, 113.

As was discussed above, the Berne Convention allows rather broad margins for compliance with its Articles. Article 6*bis*, in fact, includes language that exempts individual States from mandating that a post-mortem right remain in an author's rights,⁵⁶ an exemption the United States has taken advantage of by limiting author's rights to his or her lifetime.⁵⁷ Indeed, the Berne Convention's broad margins are arguably so wide as to not filter out any deviance in national law whatsoever. As one author puts it: "To truly comply with the Berne Convention, it may be necessary for U.S. law to depart from its utilitarian, market-driven tradition, and to affirmatively provide protection to authors in a manner consistent with that provided by other member countries of the Berne Convention."⁵⁸

Copyright protection in the United States stems from the Constitution⁵⁹ wherein the goal is the promotion of the progress of "Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries."⁶⁰ The very *purpose* of intellectual property protection, then, is related to the benefit of the community as a whole by means of offering compensation to those whose work advances this progress. The purpose is not to reward the authors, but rather they are rewarded as a means to the end goal of promoting public progress. When the United States implemented the Berne Convention in 1989,⁶¹ over 100 years after the

⁵⁵ Berne Convention, *supra* note 9, Art. 6*bis* (1) and (2).

⁵⁶ *Id.*, Art. 6*bis* (2) and (3). "However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed." *Id.*

⁵⁷ The Visual Artists Rights Act, *supra* note 54, § 602 (d).

⁵⁸ Suhl, *supra* note 49, at 1228.

⁵⁹ U.S. Const. art I., 8, cl. 8.

⁶⁰ *Id.*

⁶¹ The Berne Convention Implementation Act, *supra* note 16.

Convention's inception, the consensus of the consultants was that the United States should and could adhere to it without making major changes in United States law.⁶² The United States had long resisted joining the Berne Union for multiple reasons, chief among which was its aversion to moral rights laws.⁶³

A classic example of United States law prior to its official – albeit arguably inadequate -- adhesion to Berne's moral rights principles is the 1948 New York *Shostakovich* case⁶⁴ in which the plaintiffs, musical composers of international renown from the Soviet Union, sued a United States film company. The composers sued for the erratic and out-of-context use of their music compositions in one of the company's films, despite the credit they were given in connection with the abridged music. The court stated that there were not any well-founded reasons to believe that the film company distorted the compositions nor reason to believe that the compositions had not been faithfully reproduced. In trying to come to terms with the concept of moral rights, the court asked: "Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined."⁶⁵ The court therefore held that, in the absence of any clear showing of the infliction of a willful injury or of any invasion of a moral right, it should not consider granting the plaintiff's requested injunctive relief.

⁶² See Roundtable Discussions on United States Adherence to the Berne Convention (Nov. 25-26, 1987).

⁶³ "Article 6bis of Berne has generated one of the biggest controversies surrounding United States adherence to Berne....Article 6bis would disrupt existing business practices..." See H.R. 4262, The House Report on the Berne Convention Implementation Act of 1988, May 6, 1988.

⁶⁴ *Shostakovich v. Twentieth Century Fox-Film Corp.*, 80 N.Y.S.2d 575 (1948).

⁶⁵ *Id.*, at 71.

i. The Universal Copyright Convention and the Berne Convention Implementation Act

Under the auspices of the United Nations Educational, Social and Cultural Organization [hereinafter UNESCO], the Universal Copyright Convention of 1952 [hereinafter the UCC] was concluded with the key objective of rapidly bringing the United States into multilateral copyright arrangements.⁶⁶ The UCC was drafted so as to require as few changes in United States domestic law as necessary for the United States to sign on. The UCC was therefore something of a watered-down version of the Berne Convention and, because several States are signatories to both, Article XVII and the Appendix Declaration of the UCC establish that among states party to both, the terms of the Berne Convention govern. While the United States' eventual Berne Convention Implementation Act [hereinafter BCIA] was far from perfectly mapped onto Article *6bis* of the Convention, the United States' former approach to moral rights was not immediately construed as *per se* inadequate. The Director General of WIPO at that time stated that, in his view, "it is not necessary for the United States...to enact statutory provisions on moral rights in order to comply with Article *6bis* of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes..."⁶⁷ Whether the United States' treatment of moral rights was truly seen as adequate is debated; it is possible that various parties were so interested in the United States' adhesion to the Convention as to disregard the moral rights discrepancy for the immediate future.⁶⁸

⁶⁶ *See id.*

⁶⁷ Letter from Dr. Arpad Bogsch, Director General, World Intellectual Property Organization, to Irwin Karp, Esq., June 16, 1987.

⁶⁸ Jon A. Baumgarten and Christopher A. Meyer, *Effects of U.S. Adherence to the Berne Convention*, ENT. L. REP., Vol. 10, No. 11 (1989). "The BCIA as finally enacted is designed to leave present American law on this subject entirely unaffected. It emphatically provides that the sum of existing U.S. legal principles

ii. The Visual Artists Rights Act

According to some, the United States' adherence to the Berne Convention did not necessarily reflect a desire to embrace moral rights, "but rather to combat copyright piracy."⁶⁹ In spite of the leniency with which the United States was allowed into the Berne Union, an act was implemented two years after the BCIA to codify certain aspects of moral rights for works of visual arts; this was the Visual Artists Rights Act⁷⁰ [hereinafter VARA].

VARA went into effect on June 1, 1991. It grants artists a continuing right to restrict the use and disposition of artistic works that they have sold to private citizens and codifies "the doctrine that artists retain inherent moral rights in their creations even after those works have been sold."⁷¹ This provision shifts certain property rights from the person who possesses the work of art back to the person who created it, an unprecedented property law alteration in United States law. VARA was drawn up and implemented because

[a]n artist's professional and personal identity is embodied in each work created by that artist. Each work is a part of his or her reputation. Each work is a form of personal expression (oftentimes painstakingly and earnestly recorded). It is a rebuke to the dignity of the visual artist that our copyright law allows distortion, modification and even outright permanent destruction of such efforts.⁷²

(copyright "adaptation" rights, federal protection against "false designations," and common law doctrines of unfair competition, privacy, and defamation) is in full and sufficient compliance with moral rights (and other) provisions of the Convention, that Congress does not intend any part of the Berne Convention to be "self-executing," and that adherence neither expands nor reduces any such existing federal or state statutory or common law analogue of the rights of paternity (a creator's right to be credited as author of his or her work) or integrity (protection against harmful distortion or mutilation). Although the new Congress is expected to consider certain moral rights-related issues, and individual plaintiffs may seek relief under current doctrine, the BCIA was structured to assure that these questions are addressed on their own merits, free of claims to Berne obligations and precedents." *Id.*

⁶⁹ Merryman and Elsen, *supra* note 47, at 356.

⁷⁰ The Visual Artists Rights Act, *supra* note 54.

⁷¹ George C. Smith, Chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law, Jan. 1991. See Merryman and Elsen, *supra* note 47, at 359.

⁷² H.R. Rep. No. 101-514, at 15 (1990).

Three specific rights are granted to visual artists under VARA. They are the right of attribution, the right of integrity and, in the case of works of visual art of “recognized stature,” the right to prevent destruction.⁷³ Although moral rights were not recognized in the United States prior to the enactment of VARA, some state legislatures had enacted moral rights laws, and a few judicial decisions accorded some moral rights protection under various theories of copyright, defamation, invasion of privacy, unfair competition and breach of contract.⁷⁴ This last theory is perhaps especially important in U.S. law because parties’ freedom to contract to whatever terms they like is a highly prized privilege. Where VARA differs significantly from its counterpart European laws is in the alienability of moral rights. Under VARA, there is a provision for the waiver of moral rights through a signed, written agreement specifying the work and the precise uses to which the waiver applies.

Congress determined that an artist’s rights “should not be absolute, but that they should be tempered by commercial realities, provided that provisions were enacted to insulate authors from being unduly influenced to give away their new-found rights.”⁷⁵ According to some, VARA’s problem lies in its restrictiveness: it grants protection only to those artists whose works are included within VARA’s narrow definition of ‘works of visual art.’⁷⁶ But ‘real’ moral rights do much more than just safeguard the alteration of

⁷³ *Carter v. Helmsley-Spear, Inc.*, 71 F. 3d 77, 83 (2d Cir. 1995).

⁷⁴ Waiver of Moral Rights in Visual Artworks, U.S. Copyright Office, Sep. 24, 1996, available at www.copyright.gov/reports/exsum.html (last visited Jan. 10, 2004).

⁷⁵ *Id.* See also VARA, *supra* note 54, 106A (e), Rights of certain authors to attribution and integrity, Transfer and Waiver. *Id.*

⁷⁶ The Visual Artists Rights Act, *supra* note 54, § 101.

the original physical object; ‘real’ moral rights also guard against distortion of representations of the art image.⁷⁷

B. France

French law epitomizes the other end of the moral rights spectrum in terms of ideology. “Moral rights arise from the French concept that a creative work contains the personality of its creator or author. Copyright is a property right, while the author's moral right is an extension of the author's character and personality. Personality is not transferable,”⁷⁸ which is why moral rights are perpetual, inalienable, and descend to the heirs of the author, even after the author transfers the economic rights to another person or company.⁷⁹ Indeed, Art. L 111-1 of the French Code of Intellectual Property provides that the author of a work enjoys a property right in that work by dint of the fact that it came from his or her soul, and that the right in that work is exclusively built-in to the creator’s being.⁸⁰ Professor Pamela Samuelson, an intellectual property law specialist and scholar currently at the University of California at Berkeley, thinks that “the rights of the author to control the integrity of the work are considered by several European countries to be the key rights, and the economic rights are secondary.”⁸¹

In addition to the Berne Convention’s stipulations for the rights to integrity and attribution, French law provides for the right of disclosure, the right to withdraw or

⁷⁷ Jane C. Ginsburg *Art and the Law: Suppression and Liberty*, 19 CARDOZO ARTS & ENT. L.J. 9, 11 (2001).

⁷⁸ Robert B. Standler, *Moral Rights of Authors in the USA* (1998), available at <http://www.rbs2.com/moral.htm> (last visited Apr. 14, 2004).

⁷⁹ French Law No. 57-298 of 11 March 1957, Arts. 6, 9, 29.

⁸⁰ French Code of Intellectual Property Law of July 1, 1992, Art. 111-1. “L’auteur d’une oeuvre de l’esprit jouit sur cette oeuvre, du seul fait de sa création, d’un droit de propriété incorporelle exclusif et opposable à tous.” *Id.*

⁸¹ Patric Hedlund, *Artists’ Rights in the Digital Universe*, available at <http://www.forests.com/digitfut.html> (last visited Apr. 25, 2004).

retract and the right to reply to criticism.⁸² The right of disclosure⁸³ prevents a publisher from modifying an author's work, except with the author's written permission. The right to withdraw or retract allows an author whose views have changed or who is unhappy with his or her work to purchase any remaining copies of that work at wholesale price and prevent future printing.⁸⁴ The right to reply to criticism gives an author the right to reply to a critic and to have that reply published in the same forum as the critique, thereby promoting discussion and debate. The same plaintiffs from the Soviet Union in the *Shostakovich* case,⁸⁵ *supra*, sued under the same premise in France; not surprisingly, perhaps, they won there.⁸⁶

C. Other Traditions

Between the United States' relative disregard for moral rights and France's great emphasis thereon, there are of course other schemas that hover somewhere in between. One such example is Russia. Russia's Copyright and Adjacent Rights Act confers on an author the rights of use of his or her work taking into account legally adapted rights and interests of third persons. "He may also prohibit third persons [from using] his work without his...permission. It is obvious that [the] author may apply both existing modes of use of his work and those which will come in [the] future. With some kind of reserve we may say that the totality of copyrights is divided into two parts: personal property rights and moral rights."⁸⁷ Specifically, a Russian author is granted an inalienable right

⁸² *Id.*, Arts. 56, 32. For an excellent discussion of French moral rights, see Thierry Joffrain, *Deriving a (Moral) Right for Creators*, 36 TEX. INT'L. L.J. 735 (2001).

⁸³ "Droit de divulgation," *Id.*, Art. 19.

⁸⁴ "Droit de retrait ou de repentir," *Id.*, Art. 32.

⁸⁵ *Shostakovich v. Twentieth Century Fox-Film Corp.*, *supra* note 64.

⁸⁶ *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americane Twentieth Century*, 1 Gazette du Palais 191 (13 Jan 1953), *aff'd*, D.A. Jur. 16, 80 Cour d'Appel Paris.

⁸⁷ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourth Session, Geneva, Dec. 9-17, 2002. WIPO/GRTKF/IC/4/INF/5 Add., available at

of recognition as the creator of the product, a right to the work's integrity, a right to use the work under the author's name or a fictitious name, and a right to make the work public.⁸⁸ While Russia's main concern during its transitional years from communism may be to dampen ubiquitous pirating of intellectual property,⁸⁹ their laws reflect some of the ideological underpinnings of European models.

In Denmark, moral rights laws are in place but the perpetuity of the right is questionable. According to a Danish report in the 1990s, the perpetuity of the moral right of integrity was not necessarily a good idea. "...European law would perhaps be better off if the Moral rights always ran out with copyright...modern society obviously cannot be forced by law to respect the integrity of works only because they are called works of art...."⁹⁰ In contrast, Spain expressly provides for the perpetuity of moral rights.⁹¹ The Netherlands "decidedly does not belong to the group of countries which recognize an eternal moral right, with the State acting as a watchdog over the integrity of works, as well as with all the ensuing dangers for freedom of expression and information."⁹² Clearly, there is no consistent adherence to any one moral rights scheme, even throughout Europe, and despite the Berne Convention's emphasis on moral rights as the primary justification for copyright law.⁹³

IV. Digitization and Digital Rights Management

http://www.wipo.int/documents/en/meetings/2002/igc/pdf/grtkf_ic_4_inf5add.pdf (last visited Apr. 24, 2004).

⁸⁸ See *Overview Legal Framework for Activities in the Sphere of Information Technologies in the Russian Federation*, available at www.outsourcing-russia.com/kb/docs/legal/116092-01.html (last visited Apr. 24, 2004).

⁸⁹ See, e.g., Erin E. Arvedlund, *Hollywood Competes with the Street in Russia; To Combat Rampant DVD Piracy, U.S. Film Companies Cut Prices*, THE N.Y. TIMES, Apr. 7, 2004.

⁹⁰ Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM. V.L.A. J. OF LAW AND THE ARTS 199, 213 (1995), quoting The Report to the ALAI Congress on Moral Rights, Antwerp, Belgium, Sept. 19-24 (1993).

⁹¹ *Id.*

⁹² Report to the ALAI Congress, *supra* note 90.

“The Internet holds out the promise of broad electronic boulevards down which the creative output of our age will travel effortlessly.”⁹⁴ This writing focuses on the situation of visual art and imagery, as opposed to music and other audio content, as it exists in tangible form and on the Internet. The most prevalent – and controversial – system by which intellectual property owners are trying to protect their visual work online is through digital rights management [hereinafter DRM]. “DRM covers the description, identification, trading, protection, monitoring and tracking of all forms of rights usages over both tangible and intangible assets including management of rights holders’ relationships. Additionally, it is important to note that DRM is the ‘digital management of rights’ and not the ‘management of digital rights,’”⁹⁵ an important distinction to remember since digitization does not necessarily require a new set of rules, just the application of old rules to new technology. “The technologies for identifying and labeling content have been present for several years. Watermarking, identifiers, and fingerprinting are the names given to these technologies, which have multiple functions and modes.”⁹⁶

It is also important to note that the definition of DRM varies depending on its context and the author; as a relatively new concept, it has yet to be immortalized in most law dictionaries.⁹⁷ DRM may describe a kind of rights validation to ensure that content being created from existing content includes the rights to do so, or it might describe the

⁹³ Craig Joyce, et. al., COPYRIGHT LAW 37 (5th ed. 2001).

⁹⁴ Ralph Oman, *From Scourge to Savior: How Digital Technology Will Save Authorship in the Age of the Internet*. WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology, Sevilla, Spain, 1997, at 209. (WIPO Pub. No. 756 (E), 1998).

⁹⁵ Renato Iannella, *Digital Rights Management Architectures*, D-LIB MAGAZINE, June 2001, available at <http://www.dlib.org/dlib/june01/iannella/06iannella.html> (last visited Apr. 15, 2004).

⁹⁶ Severine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM J.L. & ARTS 377 (2003).

management of permissions to enable the usage environment to honor the rights associated with the content. For example, if a user only has the right to view the document, then DRM technology could prevent that document from being printed. DRM may mean a whole host of other things as well, such as digital signatures and encryption, which are interesting but tangential issues to this writing.⁹⁸

For copyright owners, digital networks represent both a great opportunity and a great threat.⁹⁹ The traditional copyright system has endeavored to maintain “balance between protecting creators’ property rights and the exclusive right to control use of copies of their work, and the public good in fair access to and use of such materials.”¹⁰⁰ That balance is now more precarious because of digital technologies and the manner in which they have changed how people access and utilize information.¹⁰¹

The digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works – at virtually no cost at all to the pirate. As technology advances, so must our laws.¹⁰²

“The key difference between digital and analog identifiers lies in the ease of embedding any digital information in digital content. The information can be permanently, invisibly and indelibly attached to a digital copy.”¹⁰³

A. Watermarking

⁹⁷ See, e.g. BLACK’S LAW DICTIONARY (7th ed. 1999).

⁹⁸ Dusollier, *supra* note 96, at 382.

⁹⁹ Dan L. Burk and Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J. LAW & TECH 41, 47 (2001).

¹⁰⁰ See Intellectual Property on the Internet, *supra* note 30, at 30.

¹⁰¹ Jim Lahore, *Fair Dealing and the Digital Agenda: Will the Copyright Balance Survive?*, Vol. 18(1), Copyright Reporter, 23-34 (July 2000).

¹⁰² Report of the House Comm. On Commerce, H.R. Rep. No. 105-551, pt. 2, at 25 (1998).

¹⁰³ Dusollier, *supra* note 96, at 381.

Watermarking is often cited when discussing copyright protection technologies. A watermark is information embedded on an image that is often, but not always, imperceptible.¹⁰⁴ Generally, digital watermarking serves two primary uses: first, to control use of the work by placing instructions in the watermark that limit the uses a device may make of the work; second, to identify copyrighted works by providing identifying information in the watermarks.¹⁰⁵ The embedded information can be extracted by special software. For example, the first type of watermark, a ‘watermarking detector,’ can, when applied to content that is suspected to have been pirated, check if the content bears the watermark and thereby prove or disprove the suspicion.¹⁰⁶ The second type of watermark, a ‘transaction watermark’ allows the establishment of a link between an arbitrary user with the content he or she ‘touched.’¹⁰⁷ This practice, also called ‘fingerprinting,’ is widely used “by photo agencies, who place their name or logo on a copy of a photo for promotional purposes, and then deliver the picture without the marking once payment has been made.”¹⁰⁸

B. Corbis Corporation and DRM

Corbis Corporation, created by Bill Gates in the early 1990s, provides services for licensing images in advertising, books, newspapers, magazines, on TV, on the Internet and in films.¹⁰⁹ It offers solutions that enable publishers, advertising and design agencies

¹⁰⁴ Jeffrey P. Cunard, Keith Hill and Chris Barlas, *Current Developments in the Field of Digital Rights Management*, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Tenth Session, Nov. 3-5, 2003, at 29, available at http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_10_2.pdf.

¹⁰⁵ Markus Fallenbock, *On the Technical Protection of Copyright: The Digital Millennium Copyright Act, the European Community Copyright Directive and Their Anticircumvention Provisions*, 7 INT'L J. COMM. L. & POL'Y 4. (2003).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, at 30.

¹⁰⁸ Dusollier, *supra* note 96, at 381.

¹⁰⁹ See Corbis Corporation, Overview, available at <http://www.corbis.com/corporate/overview/overview.asp> (last visited Apr. 18, 2004).

to enhance their products with photography, fine art, illustrations and footage by managing the intellectual property rights of the copyright holders of these various forms of visual content. “In a world where the arrival of digital technology has brought serious challenges to copyright protection of music and film, Corbis is that rare thing: a business that believes copyright protection and commercial use of the Internet can peaceably coexist....”¹¹⁰ Steve Davis, an attorney and the chief executive officer of Corbis, notes that “in today’s online market, you can’t be in business without spending an enormous amount of time thinking about how to protect intellectual property: how to restrict access to it, how to exploit and market it.”¹¹¹ For a large percentage of its content, which is created expressly for licensing through its website, Corbis buys images on a contract basis and licenses them to organizations or individuals; photographers retain the copyright in their work.¹¹²

i. Fine Art at Corbis

A portion of Corbis’s website hosts an array of fine art. “From masterpieces of world art to the obscurities of well-known artists, the Corbis collection brings together the most comprehensive selection of art images in the world.”¹¹³ The first licensing deal Corbis made was with a collection of classical paintings called Archivo Iconografico; in fact, Mr. Gates initially targeted museums and art galleries based on his belief that there would soon be a market for digital images of cultural objects.¹¹⁴ Mr. Davis recalls that, in 1993, “there was no way that people could handle or pay for digital media from their

¹¹⁰ Alan Cane and Steve Davis, *Images You Can Count On: Interview Steve Davis, Corbis*, Financial Times, London, Sep. 16, 2003, at 15.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Introduction to the Corbis Art Collection, available at <http://pro.corbis.com/search/searchframe.asp?typ=set&isuid={9364dda5-2dd0-4b13-a1a4-c4ee15f22e2c}> (last visited Apr. 17, 2004).

desktops.... I remember a conference in Cannes when Phillipe de Montebello, director of the Metropolitan Museum of Art in New York, said: ‘I will never, never, never, have a digital machine in my museum.’”¹¹⁵ Now kiosks and interactive displays are commonplace.

Because of countries’ different copyright laws and the range of contractual relationships between rights managers and rights holders, any given “rights-managed” image offered by Corbis will include a unique menu of restrictions. A digitized photograph by Brett Weston, a contemporary photographer, for example, includes restrictions such as “Not available for use in clip art or clip photography product; Not available for fine art print use (limited editions of art value); and Image may not be cropped under any circumstances.”¹¹⁶ Corbis’s image of Leonardo da Vinci’s *Mona Lisa*, on the other hand, stipulates that the image is “Not available for display as artwork on plasma screens, LCD screens or other electronic televisions or monitors; and not for use by or for manufacturers or sellers of digital art products or digital display products.”¹¹⁷ Perhaps the rationale here is that the plasma screen would too closely replicate the original artwork, although, in terms of other reproductive media, poster replications of the *Mona Lisa* are widely available, begging the question whether the ban on digitization will endure.

C. Moral Rights and Digitization

Inherent in this discussion of new technologies and the ability to view, use, and disseminate cultural images in digital formats is the fact that these images are

¹¹⁴ Cane and Davis, *supra* note 110.

¹¹⁵ *Id.*

¹¹⁶ See Corbis.com, image # WE001028 (last viewed Apr. 30, 2004).

¹¹⁷ See Corbis.com, image # IH049206 (last viewed Apr. 30, 2004).

transformed from one media to another when they are digitized and essentially changed. *Whether* a digital image's very existence is acceptable when discussed in the context of moral rights is often skipped over when the analysis involves when and *how* a digital image may be used. Copyright owners of priceless works of art who have traditionally been generous in allowing museums to produce glossy catalogues that include an image of their paintings have been hesitant to allow museums to upload those same images to a website.¹¹⁸

The digitization of works on media such as CD-ROMs or computer memories and transmission of these works over telecommunications networks are revolutionizing the exploitation of creative products. This explains the current trend to transfer protection to producers, a development that has definitely gathered speed with the new creative techniques and is tending to distort the function of the *droit d'auteur* as the eighteenth-century philosophers conceived it—a natural property at the service of the creative mind.¹¹⁹

Any image incorporated into a multimedia platform must, by definition, be digitized. “The downside to digitization is that the content is reduced to a source code comprising a configuration of 1s and 0s. In this state, the information may be easily manipulated, making it very simple for either the developer or the end user to alter the original work.”¹²⁰ In addition to the ease with which an unprotected image may be altered, the digitization scenario begs the question whether the artist is or should be at ease with the transformation of his work into “1s and 0s.” Other aspects of an image will likely be altered during digitization. Its size and most likely its color tones will be

¹¹⁸ Author's conversation with a member of the Department of Visual Resources at Harvard's Fogg Museum, Summer 2003.

¹¹⁹ *Piriou, supra* note 51.

¹²⁰ E. Gabriel Perle, John Taylor Williams, and Mark A. Fischer, *Electronic Publishing and Software*, THE COMPUTER LAWYER, Jan. 2000, 10.

altered. This could ostensibly amount to derogatory treatment, although even on an international scale, “[t]here is a dearth of case law in this area.”¹²¹

Perhaps, though, there are new moral rights being inadvertently granted by dint of digitization: “[C]opyright law grants a new right of authentication, a digital counterpart of the moral right, or a right of attribution, akin to the continental moral right, in countries, such as the United States, where such a right did not heretofore exist.”¹²² Professor Ginsburg made the point that the DMCA “may contain the seeds of a more general attribution right: with sufficient ingenuity and effort, these seeds might be made to germinate.... Inclusion of the author’s name in protected copyright management information suggest that the copyright law finally affords authors of all works...a right to recognition of their authorial status.”¹²³ The right of attribution, discussed above, entitles an author to claim authorship in his or her work. In the digital sphere, the technological link between the digital document and the author’s name could provide that right without accompanying legislation. Ensuring that it is the author’s name to which an image links instead of the identity of the producer, however, could be a challenge.¹²⁴

The upside to the above predicament is that, although “new forms of communication are a threat to the exclusive copyrights...[they are] also a big possibility for gaining more markets, which could become a key to much more compensation.”¹²⁵ The compensation issue begs the question: who is being compensated. If it is the artist himself, then his consent to digitization is one set of issues; if it is an artist’s agent, heir

¹²¹ Simon Stokes, *ART AND COPYRIGHT*, 97. Hart Publishing, 2001.

¹²² Dusollier, *supra* note 96, at 390.

¹²³ *Id.*, at 391, quoting Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 10 *CARDOZO ARTS & ENT. L.J.* 9, 11 (2001).

¹²⁴ *Id.*, at 393.

¹²⁵ Rainer Oesch, *Licensing of Photographs in the Digital Age*, SEPI/ECPA Conference, Helsinki, Sep. 2003, available at <http://www.knaw.nl/ecpa/sepia/conferencePapers/Oesch.pdf> (last visited Apr. 24, 2004).

or benefactor, that is another. The issue has not been addressed consistently under the auspices of moral rights or author's rights. While nations like France deem these rights to be inalienable so that no agent could pressure an artist to give them up, the potential benefits of digitization understandably prevent a "right against digitization" from becoming part of a moral rights code. That being said, the potential harm of digitization in terms of a work's integrity and susceptibility to piracy has not been directly addressed, but there are many interested parties who are "alarmed about the potential for fraud and artistic counterfeit in the wildwest world of digital commerce."¹²⁶ Copyright law should ensure that authors, and not producers or distributors, have the same type of control with DRM that they enjoy with tangible works.¹²⁷

D. Museums and DRM Options

Museums preserve cultural integrity and diversity and fulfil their mission of exhibiting their collections to national and international audiences.¹²⁸ Whether part of that mission includes the usage of digital technology to disseminate information and imagery over the Internet is uncertain. Many museums whose collections include manuscripts, photographs, paintings, sculpture and cultural artifacts have digitized images of these works and displayed them on the Internet. While digitization can be expensive and technically complex,¹²⁹ it also holds the possibility of promoting economic development, academic research and education. Furthermore, it could enable museums to manage and exploit their collections and to make their cultural riches available to any

¹²⁶ Hedlund, *supra* note 81.

¹²⁷ Dusollier, *supra* note 96, at 399.

¹²⁸ *Intellectual Property on the Internet: A Survey of Issues*, *supra* note 30, at 111.

¹²⁹ *Id.*

person in the general community with access to a computer network, a result that is probably very compatible with the mission statement of most museums.

While many very laudable goals may be reached by digitizing collections, there are intellectual property concerns about the process that have not been fully addressed. “These concerns have sometimes paralyzed those who would otherwise enthusiastically embrace the new technologies...with many museums, rights administration procedures are currently based on a physical, print model of publication and distribution, and do not envisage the possibility of digital images of the works.”¹³⁰ Digitizing a collection ostensibly allows a museum to reach a wider clientele, to obtain assistance in managing rights and reproduction, to gain national or international promotion and marketing services, and to thereby increase revenue.¹³¹ Possible disadvantages include the loss of control in various important capacities, such as the selection of licensed content, the quantity and quality of the image, and pricing decisions.¹³² “The cultural embodiments of learning and entertainment are already spinning inexorably across the Internet which knows no national boundaries.”¹³³

Museum digitization projects clearly raise policy, technical and financial issues that should be addressed before museum images are displayed in a digital environment.¹³⁴ Cultural heritage institutions are developing new projects for online licensing of their collections. The Art Museum Image Consortium [hereinafter AMICO], a not-for-profit organization of institutions with collections of art, collaborates to enable educational use

¹³⁰ *Id.*

¹³¹ Michael S. Shapiro, *Museums and the Digital Future*, 18. International Intellectual Property Institute, 2000, available at http://www.wipo.int/about-ip/en/studies/pdf/iipi_digital_museum.pdf (last visited Apr. 24, 2004).

¹³² *Id.*

¹³³ William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 11 (2002).

of museum multimedia.¹³⁵ It provides a database documenting over 100,000 digitized artworks from several North American museums, “highlighting the creative output of cultures around the world, from prehistoric to contemporary times, and covering the complete range of expressive forms. Cultures and time periods represented range from contemporary art, Native American and Inuit art, to ancient Greek, Roman, and Egyptian works, along with Japanese and Chinese works.”¹³⁶

Another model of a digital museum collection is Russia’s Hermitage Museum. With the collaboration of IBM Corp., The Hermitage has a fully-searchable online catalog of its collection. A visitor to the website can search or browse the entire collection; once an image is located, the viewer can select from a menu of screen resolutions and angles at which the painting or artwork was photographed. The usage policy, to which the website viewer must navigate on his own, is succinct:

The contents of this site, including all images and text, are for personal, educational, non-commercial use only. The contents of this site may not be reproduced, in whole or in part, in any form without the written permission of the State Hermitage Museum. Images on this web site have been invisibly watermarked; any attempt to remove the watermarks from these images is expressly forbidden.¹³⁷

The AMICO model uses the preemptive form of digital rights management, wherein it allows access to the images only through a specific contract agreement with an educational entity or institution. The Hermitage model allows access to anyone who has access to the Internet. Like the Corbis website, the Hermitage Library transfers the onus

¹³⁴ M. Shapiro, General Counsel, International Intellectual Property Institute, First WIPO E-Commerce Conference (Sep. 1999).

¹³⁵ See AMICO, available at www.amico.org (last visited Apr. 18, 2004).

¹³⁶ See The AMICO Library, available at <http://www.amico.org/AMICOLibrary/contents.html> (last visited Apr. 18, 2004).

¹³⁷ The Hermitage Museum, Conditions of Use, available at http://www.hermitagemuseum.org/html_En/00/hm0_7.html (last visited Apr. 18, 2004).

of copyright infringement responsibility to the end user. For example, it does not technologically prevent someone from right-clicking on an image and saving it to her hard drive or using it as wallpaper, which would probably be an acceptable usage of the image, but it has the technological capacity to find out that kind of information and thereby bring suit against any entity that uses its images in a fashion inconsistent with its terms.

Another model is demonstrated by an older system used by the Getty Museum for its website.¹³⁸ In 2002, the Museum implemented a copyright scheme whereby all images on the J. Paul Getty Museum website larger than a thumbnail contained a watermark stating who owns the image; a click would bring the user to the Getty copyright clause.¹³⁹ “We protect what we need to protect;” other than that, “we encourage you to rip, mix and burn. After all, it's your cultural heritage.”¹⁴⁰ The Getty’s website currently operates similarly to that of the Hermitage.

E. Non-Museum Art and DRM

Another possibility in licensing digital content is to go through a collective rights organization. For example, the Media Image Resource Alliance [hereinafter MIRA], based in New Jersey, is a joint project of the Copyright Clearance Center and the Association of Media Photographers. The VERDI project [Very Extensive Rights Data Information Project] is a European multimedia information and licensing network between nationally-managed clearance services designed to facilitate rights trading. By linking together these existing rights clearance centers, “VERDI will create a simple and

¹³⁸ The current system seems to parallel that of the Hermitage, i.e., there is no interference between viewing the thumbnail and a larger image, and a viewer must take it upon himself to find and read the copyright terms of use. See <http://www.getty.edu/legal/copyright.html> (last visited Apr. 24, 2004).

cost-effective Internet-based service for multimedia rights clearance. VERDI will provide the producer the services and information he needs for obtaining the right to use pre-existing content in his multimedia production.”¹⁴¹

F. Collecting Societies

Collecting societies are private societies established by authors and proprietors of neighboring rights with the objective of protecting their rights collectively in areas of use where individual collection is not possible. Most collecting societies perform four basic functions. They license works in which they hold the copyright or for which they act as agent on behalf of their members for specific uses; they monitor use and collect revenues; they distribute revenues as royalties to members; and they enter into reciprocal arrangements with foreign collecting societies to collect and distribute local royalties to foreign rightsholders and to receive and distribute royalties earned overseas to local rightsholders.¹⁴²

In the majority of contexts in which it is defined and discussed, collecting societies are more important to the music industry than to that of visual arts. As mentioned above, the first collecting society, SACEM, was formed in France in the mid-1800s. It served as a model for other societies such as the UK Performing Rights Society (PRS), German Gesellschaft für Musikalische Aufführungen (GEMA) and Australia's Australian Performing Right Association (APRA).¹⁴³ The American Society of Composers, Authors & Publishers (ASCAP) was established in 1914 and has flourished.

¹³⁹ Kenneth Hamma, Assistant Director for Collections Information and Project Director for Getty.edu. See Martha Lufkin, Tip-toeing through the Jungle, THE ART NEWSPAPER, Jan. 2002.

¹⁴⁰ *Id.*

¹⁴¹ See *The Verdi Project*, available at <http://gdz.sub.uni-goettingen.de/tecup/Verdi.htm> (last visited Apr. 24, 2004).

¹⁴² Caslon, *supra* note 52.

¹⁴³ *Id.*

Despite the number of collecting societies, “there is no single collective rights management body covering all countries or all of the web. As with most commercial and intellectual property law there is instead a patchwork: resplendent in places, threadbare or moth-eaten in others.”¹⁴⁴ Reciprocity is encouraged by the Confederation Internationale des Societes Auteurs & Compositeurs [hereinafter CISAC], the International Federation of Reproduction Rights Organizations, the Bureau International des Sociétés Gérant les Droits D'Enregistrement et les Reproduction Mecanique and other bodies. CISAC has been active in encouraging international standards for the identification of copyright works, exchange of rights information between databases and the development of electronic copyright management and digital rights management systems.

Founded in 1926, CISAC is a non-governmental, non-profit organization. Its headquarters are established in Paris, with regional offices in Buenos Aires and Singapore.¹⁴⁵ CISAC works towards increased recognition and protection of creator's rights. As of January 2004, it represents 209 authors' societies in 109 countries. CISAC indirectly represents more than 2 million creators, covering all the artistic repertoires: music, drama, literature, audio-visual works, graphic and visual arts, although income from music currently represents well over 90% of all revenue. Most of the international academic studies of the current state of collecting societies has focused on the music sector, presumably because of the interaction of bundles of rights and uses and the size of the market.¹⁴⁶ Its activities are aimed at improving the position of authors and composers, and at enhancing the quality of the collective administration of their rights

¹⁴⁴ *Id.*

¹⁴⁵ See CISAC, International Confederation of Societies of Authors and Composers, available at <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=MAN-AR-05> (last visited Apr. 25, 2004).

throughout the world. With the growing importance of the Internet and its challenge to the administration of authors' rights, CISAC reinforces its role as a service-driven organization. Insofar as a conduit through which an artist's moral rights might be enforced, collecting societies seem to play a very limited role, even in France. There, courts have been extremely hesitant to accept commencement of legal actions of persons other than family members of an author or artist.¹⁴⁷ In the United States, of course, moral rights, if they exist at all, expire with the artist.

The Artists' Rights Society [hereinafter ARS], an American company, is an affiliate of CISAC. ARS is the "preeminent copyright, licensing, and monitoring organization for visual artists in the United States. Founded in 1986, ARS represents the intellectual property rights interests of over 30,000 visual artists (painters, sculptors, photographers, architects and others) and estates of visual artists from around the world."¹⁴⁸ The current struggle regarding collecting societies revolves around the advent of the Internet and the new role of digital rights management in a realm the collecting societies have overseen for so long. An international symposium is taking place in Switzerland at the end of June of this year to address the very topic; its title is *Digital Rights Management: The End of Collecting Societies?*. The objective of this symposium is to take "a critical look at the challenging and equally important issues of content distribution in the digital era. The focus is placed upon the controversial relationship between DRM and Collecting Societies."¹⁴⁹

¹⁴⁶ See Caslon, *supra* note 52.

¹⁴⁷ See Dietz, *supra* note 90.

¹⁴⁸ See Artists Rights Society, available at <http://www.arsny.com/index.html> (last visited Apr. 25, 2004).

¹⁴⁹ See The University of Lucerne Faculty of Law, *The End of Collecting Societies*, available at http://www.unilu.ch/images/bilder_rf/Programme.pdf (last visited Apr. 25, 2004).

G. Photographs of Paintings and Digitization of Photographs of Paintings: The Bridgeman Case and the Public Domain

As mentioned above in the discussion of the importance of moral rights for imagery on the Internet, much of this discussion is based on the interest of the author in his work, assuming that there is one. In many cases, however, when a work falls into the public domain, or when there are no provisions for the continuity of a deceased artist's moral rights, there is no moral rights law with which an entity must tangle. While French law passes some moral rights from the artist onto his or her heirs, many countries do not; the artist's moral rights interest in the work ends upon his or her death. For this reason, some museums with older works do not need to grapple with the questions like whether the painter of a 13th century icon painting would have been horrified at the digitization of his work; he is not alive and possibly anonymous. The vast majority of museums, however, do need to deal with it to some extent. The Louvre's online image of Leonardo da Vinci's *Mona Lisa*, for example, includes a copyright line that reads: "R.M.N./H. Lewandowski - Le Mage – Gattelet."

The R.M.N. stands for la Réunion des Musées Nationaux, a French institution that was founded in 1895 to raise and administer the funds required for the acquisition of works of art by national collections.¹⁵⁰ In the 1930s, it took over the publication of postcards, guides and catalogues for the national museums' permanent collections and the temporary exhibitions organized by the R.M.N. This publishing activity — extended to audiovisual publications, and, since 1993, to multimedia — has flourished in recent years and the R.M.N.'s structure has changed accordingly. Today, the R.M.N. also disseminates cultural material, striving to reconcile its mission as a public service with

market forces. The three names that follow the “R.M.N.” attached to the image of the Mona Lisa are photographers who are members of the Photographic Agency of the R.M.N.¹⁵¹ In this sense, the Louvre website operates much like that of Corbis. The original artist is credited, of course, but the copyright in that image of the Mona Lisa is ascribed to the R.M.N. and these photographers.

The reproduction of fine art in new media, such as digitized images on the Internet, poses new problems for traditional rules. The United States was given some controversial guidance on the principle in the 1999 case *Bridgeman Art Library v. Corel Corporation*.¹⁵² The Bridgeman Art Library is a British company that acquires photographs of works of art in the public domain and then licenses the use and reproduction of these photographs.¹⁵³ Corel is a Canadian corporation that sells computer software products, one of which was a set of seven CD-ROMs containing seven hundred photographic images of public domain paintings by European artists. Corel claimed to have obtained the images from a source other than Bridgeman, but Bridgeman filed suit against Corel for the 120 images that looked identical to those in the Bridgeman collection, and for which Bridgeman claimed copyright. At issue was whether a photograph of a two-dimensional painting is copyrightable, and the court ultimately decided it is not.¹⁵⁴

¹⁵⁰ See *Réunion des Musées Nationaux*, available at <http://www.rmn.fr/index-gb.html> (last visited Apr. 24, 2004).

¹⁵¹ Agence photographique de la Réunion des Musées Nationaux, available at <http://www.photo.rmn.fr/fr/index.html> (last visited Apr. 24, 2004).

¹⁵² 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

¹⁵³ The Bridgeman Art Library has since been bought by Getty Images. “Getty Images produces, preserves and markets the largest collection of imagery in the world.” See Getty Images, Our Company, available at <http://corporate.gettyimages.com/about/> (last visited Jan. 30, 2004).

¹⁵⁴ 36 F. Supp. 2d at 195.

While this decision's ramifications may be quite broad, they will not necessarily be injurious to the image houses that currently license the photographs. The two most fertile corporations in this domain are Getty Images and Corbis. Getty Images recently acquired the Bridgeman Library's images and now offers them in digital format for rights-managed licensing. While Getty Images may not be able to claim to own the copyright in these images, as per the *Bridgeman Art Library* decision, it has the advantage of having access to the Bridgeman photographs, which are of very high quality. For an amateur to take a similar photograph would be difficult at best; to locate the painting and gain permission to do so would likely be even more of a challenge. One of the Bridgeman Art Library's images was the *Mona Lisa*. A high-quality image of the *Mona Lisa* is now available on Getty Image's website for licensing. The text below the image reads "The Bridgeman Art Library (rights-managed)."

V. Amedeo Modigliani

At the beginning of this writing, I presented three possible venues at which to view one of Amedeo Modigliani's paintings of Jeanne Hébuterne. The first was the website www.artnet.com, a "place to buy, sell and research fine art online."¹⁵⁵ Its Online Gallery Network comprises images from over 1,300 galleries, 36,000 works and 13,000 artists from around the globe. "The Network serves dealers and art buyers alike by providing a survey of the market and its pricing trends, as well as the means to communicate instantly, inexpensively and globally."¹⁵⁶ While the images at artnet do not have an attached copyright line and generally seem to be downloadable, there is a clear Terms and Conditions policy on the website. Among its provisions, artnet claims:

¹⁵⁵ See www.artnet.com (last visited Apr. 25, 2004).

¹⁵⁶ *Id.*

You may not modify, create derivative works from, participate in the transfer or sale of, post on the World Wide Web, or in any way exploit the Site or any portion thereof for any public or commercial use without the express written permission of artnet.com. You may download one (1) copy of Content from the Site for your personal use, provided that you maintain all copyright, attribution and other notices contained in such Content, including without limitation trademarks and service marks of artnet and its affiliates or the copyright holder identified in the individual Content's copyright notice. You acknowledge that you do not acquire any ownership rights by downloading copyrighted material. You are responsible for complying with all applicable laws, rules and regulations regarding your use of any such downloaded Content. In the event of any permitted copying, redistribution or publication of material from the Site, no changes in or deletion of author attribution, trademark, legend or copyright notice shall be made.¹⁵⁷

The next place I suggested to look at the digitized image of this Modigliani painting was through the Gettyimages website. A Getty photographer, Odd Andersen, photographed the painting being hung on a wall at Christie's auction house on January 29, 2004. The caption to the image reads:

LONDON, UNITED KINGDOM: A Christie's auction house porter adjusts Italian painter Amedeo Modigliani's "Portrait de Jeanne Hebuterne," estimated value 5-7 million pounds (7.3-10.2 million euros) in London, 29 January 2004. The painting is part of Christie's 19th & 20th century art evening sales week, expected to fetch a total of 75 million pounds (109.5 million euros)...Restrictions: This image is only available in Getty Images offices in the United Kingdom, United States, Germany (Austria, Switzerland via Germany), Hong Kong, Singapore, and Australia.

In addition to these specific restrictions for this image, Gettyimages states in its Terms and Conditions section that:

All elements of Getty Images websites, including, but not limited to, the general design and the Content, are protected by trade dress, copyright, moral rights, trademark and other laws relating to intellectual property rights. Except as explicitly permitted under this or another agreement with Getty Images or one of its subsidiaries or content providers, no portion or element of this website or its Content may be copied or retransmitted via any means and this website, its

¹⁵⁷ See Artnet, Terms and Conditions of Use, available at <http://www.artnet.com/about/antscs.asp> (last visited Apr. 25, 2004).

Content and all related rights shall remain the exclusive property of Getty Images or its third party content providers unless otherwise expressly agreed. Content (including photographic images) purchased or otherwise acquired by you via the Site may only be used by you for personal, non-commercial purposes (i.e., not for re-sale or re-distribution) and may not be duplicated or otherwise reproduced or altered by you.¹⁵⁸

I also noted that, because the painting did not sell for the reserve price set by the auction house, it was probably returned to the previous owner. Perhaps it is hanging in his or her home. What would Amedeo Modigliani think of his paintings being digitized and exhibited in these various fora? There is no text attached to the images that explains who his subject is or why he painted her. He painted this particular piece in oil; would he have condoned this work being uploaded onto the Internet at all? Is it a foregone conclusion that web dissemination of an image of art is a benefit to society? A benefit to the artist?

Amedeo Modigliani was born in Livorno, Italy, in July 1884. Both sides of his family were Sephardic Jews. His father Flaminio was an unsuccessful entrepreneur who had a small money-changing business, and his mother, Eugenia, ran an experimental school.¹⁵⁹ Modigliani moved to Paris in 1906, at the age of 22. He struggled for several years with periods of poverty, bouts of depression, and difficult relationships. In July of 1917, he met Jeanne Hébuterne, who was then aged nineteen. The two lived together between the French Riviera and Paris and had a child together the following year. Jeanne became pregnant again in May of 1919. A few months later, Amedeo became very ill. In mid-January of 1920, he was bedridden and comatose, suffering from tubercular meningitis. He died on January 24, 1920, without regaining consciousness. There was an

¹⁵⁸ See Gettyimages, Site Terms and Conditions, available at http://editorial.gettyimages.com/ms_gins/CFW/terms.aspx (last visited Apr. 25, 2004).

elaborate funeral, attended by the whole of the Montmartre neighborhood of Paris. Jeanne, who had been taken to her parents' house, threw herself out of a fifth floor window two days after Modigliani's death, killing both herself and her unborn child.¹⁶⁰

Amedeo and Jeanne's surviving daughter, also named Jeanne, created the "Archives Légales Amedeo Modigliani" [Legal Archives of Amedeo Modigliani] in 1983, a cultural association registered with the Paris Police Prefecture. The creation of this organization, upon the decision of Jeanne Modigliani, aimed to classify and protect the works of the artist. For 15 years, the association has been working along these lines, faithful to its initial objective: to safeguard the worldwide spread of the knowledge of the artist's works and the historical and esthetic information regarding them.¹⁶¹ The website has an image archive of thumbnails for possible licensing. Modigliani's estate is not handled by the United States' Artists Rights Society, as are many other famous artists; however some of his works are available, *inter alia*, in the Bridgeman Art Library collection, discussed above, as well as at various museum websites,¹⁶² and in printed catalogues.¹⁶³

The reason I believe this detailed promenade through the significance and reinvention of Modigliani's Portrait of Jeanne Hébuterne is important to this writing is that it demonstrates the frenetic nature of current rights management systems with regard

¹⁵⁹ See Amedeo Modigliani, biography, available at <http://www.artchive.com/artchive/M/modigliani.html> (last visited Apr. 25, 2004).

¹⁶⁰ *Id.*, quoting Edward Lucie-Smith, LIVES OF THE GREAT TWENTIETH CENTURY ARTISTS. Thames & Hudson, Sep. 1999.

¹⁶¹ See Archives Légales Amedeo Modigliani, available at <http://www.modigliani-amedeo.com/ServENG.htm> (last visited Apr. 25, 2004).

¹⁶² See Guggenheim Museum, Le Sweater Jaune, available at http://www.guggenheimcollection.org/site/artist_work_md_110_1.html (last visited Apr. 25, 2004).

¹⁶³ See Modigliani and the Artists of Montparnase, available at <http://templates.earthstores.com/1129/proddetail.asp?id=4C41434D4173746F7265&prod=186511> (last visited Apr. 25, 2004).

to copyright. Whether an artwork is in the public domain, whether the artist is alive, the nationality of the artist, and the country in which an artwork is infringed upon in some manner are only starting points to an analysis of the correct application of law. To truly harmonize copyright protection for visual imagery would take more than a loosely-worded international treaty since deep-rooted cultural and moral tenets regarding the value of a creative work come into play and those values vary dramatically, even amongst parties to the Berne Convention.

Before digital rights management systems become more sophisticated, I would hope that WIPO and other international organizations that are involved in the regulation of the Internet consider that there is no fast way to streamline copyright protection for images on the Internet. The blessing and curse of the Internet is its ubiquity. The blessing and curse of advanced technology is the ease with which imagery can be transformed and manipulated. The challenge inherent in this situation arises from a single worldwide platform on which to view digital imagery but a gamut of different ideologies as to how and whether those images should be available. Who, then, should make the ultimate decisions? “The parameters of the debate regarding copyright law have historically been shaped, and continue to be shaped, by legislators and lobbyists, with little involvement by others. This trend persists in the debate regarding copyright in cyberspace.”¹⁶⁴ This, among many other issues, highlights that those who have an interest in the integrity and distribution of their creative works are not often the same people who have authority or power of persuasion insofar as the law regarding this issue is concerned.

¹⁶⁴ Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 149, 229 (1999).

Technology continues to reinvent itself. Bill Gates, Corbis's owner, has approximately 30 flat-screen monitors in his Medina home to show digital pictures. Gates and his wife Melinda "generally shuffle the images displayed on these monitors every week. Nearly always they come from Corbis's stock of 70 million pictures. He likes sunsets and pictures to do with the Second World War, golf, sailing and Nobel Prize winners."¹⁶⁵ The possibility of viewing beautifully digitized artwork in this fashion is an amazing triumph for visual technologies. Indeed, "[t]he commodification of images of public domain works of art makes it possible for us to adorn our every day lives with images of fine art." Interestingly, most 'fine art' images on the Corbis website, like the Mona Lisa mentioned above, and such as a Modigliani painting of his wife, stipulate that the image is not available for display on big screen media. It is my hope that this kind of restriction will remain intact.

As an individual who has had the opportunity to work at museums, an auction house, and an image bank, I believe that most, if not all, individuals affiliated with these entities desire a copyright and DRM scheme that satisfies the interests of all parties. I also believe that the conversation could be fleshed out insofar as artists themselves are concerned; it is essential to keep an artist's moral rights a substantial part of the discussion, since they are the people whose creativity is exploited (in terms of dollars) or exhibited (in terms of allowing the public to enjoy their creations).

VI. Conclusion

The foundational contention woven throughout the whole of this writing is that the copyright equation is not a horizontal one between rights holders and the public.

¹⁶⁵ David Usborne, *Sitting Comfortably? Then Gates will Tell You about His Other Firm*, Independent on Sunday (London), Jan 18 2004, at 6.

There is also an inherent element of the equation that should guarantee that artists retain some measure of control over their creations. Copyright has long been available to give rights holders the ability to prevent unauthorized uses of their content. Standing alone, the law cannot prevent illicit uses, regardless of whether they are undertaken unfairly or legitimately.¹⁶⁶ In other words, “the moral content and legitimacy of a digital copyright regime will depend on the perception that the law is obeyed.”¹⁶⁷ The ultimate aim of using technical measures to manage delivery of intellectual property must be “to balance the requirements of rights owners to control and protect the distribution of content with the interest of consumers to have access to that content...unless copyright is to be abandoned as a mechanism for trading in intellectual property entirely, it will be essential to find an answer to this paradox.”¹⁶⁸ The scope of copyright protection still varies from jurisdiction to jurisdiction. “Confronted with this legal diversity and the technical ease for infringement offered by digital media, copyright holders [and artists themselves] may be reluctant to make protected material available on-line.”¹⁶⁹

I propose that international copyright law is fragmented and will remain so in the immediate future. As was noted almost ten years ago: “Copyright from its historic beginnings centered around works of literature and art in the traditional sense of the word; moral rights have been developed with this in mind...we must adapt our positions to the new situation, in order to save the principle as such.”¹⁷⁰ While an eventual international plan may eventually come into being, the balance between rightsholders and

¹⁶⁶ Cunard et. al., *supra* note 105, at 11.

¹⁶⁷ Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 567 (2003).

¹⁶⁸ *Id.*, at 12.

¹⁶⁹ Michel A. Jaccard, *Securing Copyright in Transnational Cyberspace: The Case for Contracting with Potential Infringers*, 36 COLUM. J. TRANSNAT'L. L. 619, 661 (1997).

¹⁷⁰ Dietz, *supra* note 90, at 24.

consumers must be equated while taking into account the substantial rights of the original authors, whether they hold the economic-based copyright or not, and therein lies a very difficult equation to balance on the international scale. Moral rights are not dead yet, and it is incumbent upon current policymakers to balance the copyright equation between rights holders, end-users, and, quite importantly, artists.